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OBJECTIONS AND EXCEPTIONS

LEO CARLIN*

The law in West Virginia, both judicial and statutory, as to the necessity of excepting to the ruling of a court for purposes of review, is somewhat in confusion. There is likewise, according to the observation and information of the writer, a similar confusion in the practice prevailing in the various judicial circuits of the state. The object of this discussion is not to cover the whole field of objections and exceptions, even in the local law, but to review the statutes and a few selected cases which bear upon some of the more general aspects of the subject or illustrate the doctrines or theories which have influenced the decisions. Primarily, the intention is to deal with the local law; but, since the local law, particularly as complicated by confusion in the decisions, is to a great extent the result of the application of doctrines and theories which are not peculiar to this state, a brief general survey of the law and the principles involved will be helpful.

An exception is ordinarily the culmination of a series of events. In the ordinary sequence, a party to the litigation presents a *proposition* to the court by way of asking for a certain ruling or certain court action. The opposite party interposes an *objection* to the proposed ruling or action. Then comes the *ruling or action* by the court. Finally, the losing party, whether proponent or objector, saves his *exception* to the ruling or action. A further event, depending upon the status of the matter involved, may be a *bill of exceptions* making all these prior events part of the record for purposes of appellate review.

It is said that an objection is made to the action of another than the trial court, for the purpose of obtaining a ruling of the court upon such action, while an exception is taken to the action of the court after the court has acted.¹ The objection is intended to forestall that which is sought by the proponent and the exception

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¹ State *ex rel.* Brockman Mfg. Co. v. Miller, 241 S. W. 920 (Mo. 1922). "It must be remembered that objections are addressed to the trial court, while exceptions are made as a predicate for review of the ruling of the trial court." General Explosives Co. v. Wilcox, 131 Okla. 190, 268 Pac. 266 (1928).

It would seem, however, that an exception in part is also addressed to the trial court, since one of its important functions is supposed to be to warn the trial court that the exceptor does not acquiesce in the ruling.

to indicate dissatisfaction with the result.² Hence the one comes before the ruling and the other after it. These distinctions are sanctioned generally by the great weight of authority, but, unfortunately, they have not always been observed. The term "exception" has usually been confined to its proper connotation and sequence as noted above; but the term "objection", with resulting confusion, has often been used in the cases and in the statutes as equivalent to "exception" when used in its proper sense.³

Ordinarily, when a ruling or action by a court is proposed, an objection by the opposing party is prerequisite to availability of an exception.⁴ Absence of an objection is understood to indicate acquiescence and leaves nothing to serve as the subject of an exception. Here the implication of acquiescence would seem to have greater strength and validity than the implication of waiver or acquiescence (hereinafter discussed) arising through failure to except to action by a court after it has taken place, over an objection. In the latter instance, the party has already, by his objection, indicated his dissatisfaction with what is proposed. If he excepts after his objection is overruled, he merely repeats his dissatisfaction. However, contrary to the general rule, there are no few instances where the errors committed are of such a nature or of such gravity that they may be reviewed by an appellate court without either objection or exception. For instance, to mention only some of the more prominent exceptions to the general rule, it is said that no objection is necessary when "fundamental rights" are involved;⁵ when "fundamental and determinate errors," apparent on the record, are committed;⁶ when questions of public interest or policy are involved;⁷ or when an objection would be useless because the matter involved would not be subject to correction,⁸ as where the court lacks jurisdiction of the subject matter of the

² And, at the same time, on proper occasions, to furnish material for a bill of exceptions, when the latter is necessary.

³ See *King v. Burdett*, 12 W. Va. 688, Syllabus (1878); *Sweeney v. Baker*, 12 W. Va. 158, 212 (1878); *Perry v. Horn*, 22 W. Va. 381, 383 (1883); *Spence v. Robinson*, 35 W. Va. 313, 316, 13 S. E. 1004 (1891); *Baker v. Gaskins*, 124 W. Va. 69, 19 S. E. 2d 94 (1942); W. VA. CODE, c. 56, art. 6 §35 (1931).

⁴ The cases supporting this proposition are too numerous to cite. See 4 C. J. S. 495 (1937); 3 AM. JUR. 25 (1936).

⁵ See 4 C. J. S. 485 (1937); 3 AM. JUR. 33 (1936).

⁶ See 4 C. J. S. 497 (1937); 3 AM. JUR. 33 (1936).

⁷ See 4 C. J. S. 485 (1937); 3 AM. JUR. 35 (1936).

⁸ See 4 C. J. S. 486-7 (1937) for numerous illustrations.

litigation.⁹ Since the parties cannot bestow jurisdiction even by express stipulation, of course they cannot do so impliedly by failing to object.

Two different theories have been relied upon by the courts as justifying the requirement of an exception to the action or ruling of a court, although preceded by an objection. These theories have nothing in common and, to a certain extent, are antagonistic in their application.

One theory may be described as somewhat mechanistic in concept and has a historical background and explanation. It evolved, as an incident, it might be said, to a process devised for the purpose of permitting appellate review of trial error. Originally, as today, the only way to review the proceedings of a lower court in an appellate court was through the medium of a record of those proceedings. The record was the only means of showing the appellate court what had happened in the lower court. If the matter did not appear in the record, it could not be reviewed. The content of the common law record (the "strict record," the "record *per se*," or the "record proper," as it is now variously called) was practically limited to the pleadings. It became definitely so fixed and immune to expansion long before there was any necessity for the review of trial error, now the most prolific field for appellate review. In the beginning, when cases were tried by ordeal or by battle, there was no opportunity for the commission of trial error; and even after the finding of a jury was substituted for the result of the ordeal or battle, for a long time no trial error occurred which could be the subject of review. The jurors were the witnesses in the case and came into court prepared to render a verdict on their arrival. But when the jurors ceased to be the witnesses in the case and functioned merely as judges of the facts in dispute, and the witnesses were brought in to testify before them under rules of evidence, which then began to develop, the whole field of trial error was opened up. Ultimately, in a given case, a review of trial error in an appellate court might be more important to a litigant than a review of error in the pleadings in many cases; but, under the common law, no such review was possible, because things which happened at the trial were not part of the record. Consequently, it was necessary to devise a statutory method for the

⁹ 4 C. J. S. 486 (1937); 3 AM. JUR. 67 (1936).

purpose of reviewing trial error.¹⁰ The result was the enactment of the Statute of Westminster II,¹¹ which provided that a litigant might except to the rulings of the court in the progress of the trial, embody his exceptions in bills of exceptions, and have the bills of exception made part of the record for purposes of review in an appellate court.¹² Thus, it is said, the concept of exceptions and their function came into being.

Obviously, the function of the bill of exceptions was intended to be to bring something into the record¹³ which was not a part of the record *per se*, and an exception was necessary because, under the statute, it was the raw material which formed the substance of the bill of exceptions. If there was no exception, there was nothing with which to manufacture a bill of exceptions. Conversely, it could be reasoned, and is reasoned in a great number of decisions today, that, if the only use for an exception is to supply the substance for a bill of exceptions, then, when no bill of exceptions is necessary, an exception is likewise unnecessary. Consequently, there is a long line of decisions holding that, when the ruling or action of the court pertains to something which already is part of the record without the aid of a bill of exceptions, no exception is necessary.¹⁴ This view is briefly and emphatically stated by a Georgia court in the following language:

¹⁰ For an outline of the origin of bills of exceptions, see Carlin, *A Modern Substitute for Bills of Exception*, 25 W. VA. L. Q. 198 *et seq.* (1918).

¹¹ 13 EDW. I, c. 31 (1285).

¹² "When one impleaded before any of the justices alleges an exception, praying that they will allow it, and if they will not, and he, that alleges the exception, writes the same, and requires the justices will put to their seals, the justices shall do so; and if one will not, another shall; and if upon complaint made of the justices the king cause the record to come before him, and the exception be not found in the roll, and the plaintiff show the written exception with the seal of the justices thereto put, the justice shall be commanded to appear at a certain day, either to confess or deny his seal, and if he cannot deny his seal, they shall proceed to judgment according to the exception, as it ought to be allowed or disallowed." See *Dryden v. Swinburne*, 20 W. Va. 89, 108 (1882).

¹³ "The record proper ordinarily embraces the original writ, the pleadings and the entry of verdict and judgment." 2 THOMPSON, TRIALS 2037 (2d ed. 1912).

¹⁴ *National Savings & Trust Co. v. Ryan*, 49 App. D. C. 159, 262 Fed. 613 (1919); *United States v. La Franca*, 282 U.S. 568 (1931); *Griggs v. Nadeau*, 137 C. C. A. 189, 221 Fed. 381 (8th Cir. 1915); *People ex rel. Carr v. Omega Chapter of Phi Upsilon Fraternity*, 320 Ill. 326, 150 N. E. 677 (1926); *Dever v. Brown Shoe Co.*, 226 Mo. App. 1179, 49 S. W. 2d 267 (1932); *Muldoon v. Dock Contractor Co.*, 199 App. Div. 733, 192 N. Y. Supp. 19 (1922); *Gourley v. Williams*, 46 Okla. 629, 149 Pac. 229 (1915); *Schmitt v. Philadelphia*, 248 Pa. 124, 93 Atl. 879 (1915); *Nalle v. Oyster*, 130 U. S. 165 (1913). See 3 AM. JUR. 49 (1936) and 4 C. J. S. 662 (1947) and cases cited.

"The only object of exceptions pendente lite is to preserve as a part of the record things occurring at the trial which would not otherwise appear of record."¹⁵

A good illustration of a ruling involving matters which are *per se* part of the record and therefore require no bill of exceptions to make them a part thereof, is a ruling on a demurrer to a pleading. The pleading, of course, has been filed and is a part of the record. Otherwise, it could not be the subject of a demurrer. And of course the demurrer and the court order evidencing the ruling on the demurrer are parts of the record. It has been held in numerous cases that it is not necessary, for purposes of view, to except to the ruling on the demurrer, because an exception is necessary only as to matters which must be brought into the record by bills of exceptions.¹⁶ In fact, at common law (and still to a certain extent under the statutes of jeofails), it is permissible to attack the sufficiency of a pleading, because of substantial defects, for the first time on a writ of error, although no objections was raised thereto by demurrer or otherwise in the trial court. Such defects could be made the basis of a motion in the trial court in arrest of judgment, after verdict; and it is generally held that, in any instance where a motion in arrest is proper, there is an option to resort to a writ of error in the first instance.¹⁷

Another theory explaining the necessity of exceptions, sometimes relied upon as supplemental and sometimes as substitutional with reference to the theory outlined above, has been sanctioned in a great number of cases. Under this theory, it is conceived that an exception is required, not merely to lay the basis for a bill of

¹⁵ Haygood v. McDevitt, 39 Ga. App. 647, 148 S. E. 357 (1929).

¹⁶ People *ex rel.* Douglas v. Powell, 274 Ill. 222, 113 N. E. 614 (1916); Pace v. Pace, 70 Okla. 42, 172 Pac. 1075 (1918); Platteter v. Paulson-Ellingson Lumber Co., 149 Wis. 186, 135 N. W. 535 (1912); Nalle v. Oyster, 130 U. S. 165 (1913). All these cases are based on the proposition that it is necessary to except only as to matters which must be brought into the record by bills of exception, and not as to matters which are *per se* parts of the record.

¹⁷ "Frequently the appellate court will review acts and rulings of the trial court and correct errors that are apparent on the judgment roll or record of the case, although no exceptions were taken thereto. It has been said, in this connection, that anything appearing upon the record which would have been fatal upon a motion in arrest of judgment is equally fatal upon a writ of error, although objection was not taken in the court below." 3 AM. JUR. 49 (1936). See also United States v. LaFranca, 282 U. S. 568 (1931). "Anything which is good cause for arresting a judgment is good cause for reversing it, though no motion in arrest is made." State v. Dolan, 58 W. Va. 263, 52 S. E. 181 (1905). See BURKS, PLEADING & PRACTICE 571 (1913).

exceptions, but to indicate that the exceptor does not acquiesce in the ruling or action of the court. It is supposed that, in the absence of an exception, the proposition submitted to the court or the objection thereto may have been abandoned for various reasons, and that the potential exceptor has acquiesced in what the court has done. For instance, the proposition may not have been submitted or the objection interposed very seriously in the first instance; the proposer or the objector may have become convinced of his error by argument, by the court's reasoning on delivery of the ruling, or by his own mature deliberation; or he may not consider the matter of sufficient importance for controversial pursuit. It is said that this broader concept of the purpose of an exception is a modern development which has superseded the original idea that its only purpose is to furnish material for a bill of exceptions.

"Originally, the office of an exception was to bring the matter questioned formally on the record, in order that it might subsequently be incorporated in a bill of exceptions, for use on review; because, in those times, stenographic records were not kept. Today, however, the purpose of an exception is to give formal notice that the exceptant does not acquiesce in the ruling of the court and intends again to claim the benefit of the objection or request which the court has overruled or denied. . ."¹⁸

The logic supporting the doctrine of acquiescence is well stated by Learned Hand, Judge, in the following language in a federal case:¹⁹

"A party who objects to evidence, who challenges its legal effect, or who requests an instruction, does not always mean to press the point; he may merely seek the Judge's ruling, and be content when it comes. Many arrows are shot at random in a trial, as every judge of much experience knows very well. Not to reserve the point ordinarily implies an assent to the ruling; to except, that he is not content. If not content, the judge is aware of a challenge; he may, and often does, change his ruling. Certainly he has no reason to do so, if he is justified in supposing that it has been accepted."

The over-all expediency of indicating to the court that its ruling has not been accepted is emphasized in another federal case:²⁰

¹⁸ *Gates v. Keichline*, 282 Pa. 584, 128 Atl. 490 (1925).

¹⁹ *Brown v. Carver*, 45 F.2d 673 (2d Cir. 1930).

²⁰ *Atchison, T. & S. F. Ry. v. Nichols*, 2 F.2d 12, 13 (9th Cir. 1924); *accord*, *Southern Transp. Co. v. Ashford*, 48 F.2d 191 (5th Cir. 1931); *Gangi v. Fradus*, 227 N. Y. 452, 125 N. E. 677 (1920).

"The essential purpose of an exception is to direct the mind of the trial judge to a single and precise point in which it is believed he has committed an error of law, so that he may reconsider and change his ruling, if satisfied of error, and that injustice and mistrials due to inadvertent errors may be obviated."

It is further conceived that an exception operates as a warning, not only to the court, but also to opposing counsel, who may prefer to retract a proposition or an objection in the face of a challenge rather than risk reversal of a final judgment in favor of his client.²¹

Numerous cases in accord with those quoted and cited will be found in the encyclopedias and digests under various titles.

Obviously, it would seem, if the reason why an exception is required is to indicate that the exceptor does not acquiesce in the court's ruling, the question whether the subject matter of the exception is or is not a part of the record should be wholly immaterial. There is nothing peculiar about matters which are part of the record that would prevent them, as such, from being the subject of waiver or acquiescence; and there would seem to be no less reason to assume a waiver or acquiescence as to such matters than as to matters which are not part of the record. The expediency of a final warning to the court and to opposing counsel would seem to be equal in all cases, regardless of the status of the subject matter with reference to the record. Accordingly, to resort to a field of judicial activity heretofore selected for purposes of illustration, a series of cases will be found holding that the ruling of a court on a demurrer to a pleading cannot be reviewed in an appellate court in the absence of an exception.²²

As to most matters which are preliminary to a final judgment in a common law action, and which are not concerned with the sufficiency of a pleading, exceptions are necessary, regardless of

²¹ *S. A. Lynch Enterprise Finance Corp. v. Dulion*, 45 F.2d 7 (5th Cir. 1930).

²² *Hicks v. Revels*, 142 Ga. 425, 83 S. E. 115 (1914); *T. H. Brooke & Co. v. Cunningham Bros.*, 19 Ga. App. 21, 90 S. E. 1037 (1916); *Vulcan Ins. Co. v. Johnson*, 74 Ind. App. 62, 128 N. E. 664 (1920); *W. T. Rawleigh Co. v. Hughes*, 70 Ind. App. 127, 121 N. E. 546 (1919); *Simmons v. Western Life Indemnity Co.*, 171 Iowa 429, 154 N. W. 166 (1915); *Atlas Ins. Co. v. Cotter*, 226 Ky. 554, 11 S. W.2d 427 (1928); *Todd v. Webb*, 134 Okla. 107, 272 Pac. 380 (1928). Only one of these cases mentions any reason why an exception is necessary. That case, *Simmons v. Western Life Indemnity Co.*, is based on the doctrine of acquiescence. The Georgia cases cited seem to be contrary in principle to the Georgia case heretofore cited in note 15.

the theory upon which an exception is required; because such matters are not part of the record and must be brought into the record by bills of exceptions, under the standard practice, and a bill of exceptions presupposes an exception. Wherefore it is not necessary to resort to the doctrine of waiver and it is immaterial on which theory an exception is required, so far as the results are concerned. As to whether it is necessary to except to entry of a final judgment on a verdict, the result and culmination of prior rulings, the cases are not entirely in accord; but it is generally held that no exception is necessary.²³ In fact, it has been held that a mere naked exception to a final judgment presents nothing for review.²⁴ Of course, if errors have been committed in the proceedings leading up to the judgment, because of which the validity of the judgment may be questioned, they should be taken care of by exceptions at the time when committed and the judgment may be attacked on the basis of those exceptions.²⁵ It would seem to be a useless formality to except to entry of a final judgment. It is a part of the record and no exception is necessary for purposes of a bill of exceptions to bring it into the record. To require an exception as a warning to the party in whose favor the judgment is entered would seem to be futile. There is not much chance that he would repudiate a final judgment in his favor merely because threatened with a writ of error. Nor would requirement of an exception as a warning to the court seem to have any more validity. However hastily the court may have been compelled to rule on matters in the progress of the trial, it can take time to deliberate on the propriety of entering a final judgment, and the result would not likely be affected by the challenge of an exception. It is said that, in the absence of a statute to the contrary, it is not necessary to except to the entry of a final decree in equity,²⁶ nor to rulings of the court pre-

²³ *Bartlett v. Louisville Trust Co.*, 212 Ky. 13, 277 S. W. 250 (1925); *Cincinnati Finance Co. v. Atkinson's Adm'r*, 235 Ky. 582, 31 S. W.2d 890 (1930); *Shull v. McCrum*, 179 Iowa 1232, 162 N. W. 759 (1917). *Contra*: *Cline v. Reo Macon Co.*, 28 Ga. App. 778, 113 S. E. 38 (1922).

²⁴ *Bank of Waterproof v. Fidelity & Deposit Co. of Maryland*, 299 Fed. 478 (5th Cir. 1924); *McCasky Register Co. v. Wheeler*, 21 Ala. App. 23, 104 So. 870 (1925); *Shull v. Dunton*, 62 Ind. App. 602, 113 N. E. 381 (1916).

²⁵ "But if an error which is excepted to inheres in the judgment later entered, so that there would have been no judgment had it not been for such error, then the exception need not be repeated to the final judgement in order to have that judgment reviewed." *Shull v. McCrum*, 179 Iowa 1232, 162 N. W. 759 (1917).

²⁶ *In re Culver's Estate*, 153 Iowa 461, 133 N. W. 722 (1911); *Parks v. Murphy*, 166 Ark. 564, 266 S. W. 673 (1924).

ceding the final decree,²⁷ as a prerequisite for an appeal, because on a chancery appeal the appellate court tries the case *de novo*, both as to the law and the facts, and does not look for error committed by the lower court merely for purposes of reversing the decree.²⁸

The West Virginia cases have not been entirely consistent in defining the theory on which exceptions are required. In some cases the necessity of an exception in order to frame a bill of exceptions is stated as the reason for the requirement; but in most of the cases acquiescence by failure to except seems to have received predominant emphasis. Sometimes both reasons are stated.

In the earlier West Virginia cases, contrary to the doctrine of waiver and acquiescence, it seems to have been the definite view that it is not necessary to except to a ruling on a demurrer to a pleading, although the court states no specific doctrine justifying such a view and, occasionally, seems to be puzzled by the fact that it has become the established law in this state.

"It is true, as a general rule, that if errors or supposed errors are committed by the court in its rulings during the trial of a case by a jury, the appellate court can not review those rulings, unless they were objected to at the time, and a bill of exceptions filed during the term, and a new trial asked of the court below, and refused. See leading case of *Danks v. Rhodeheaver*, 26 W. Va. 274. But in this leading case reference is made, and approvingly, to what was said in *State v. Phares*, 24 W. Va. 657, as follows: 'Of course, it is different if the error is in the pleadings, as in such case there was a mistrial.' And in the latest case on this subject, *Brown v. Brown*, 29 W. Va. 778 (2 S. E. Rep. 808), it is said in substance, that, if a demurrer to the declaration has been improperly overruled, the appellate court will reverse, though no bill of exceptions was taken, and although there was no motion for a new trial. The reasons for this distinction are not very satisfactory. Nevertheless we may regard it as firmly established in this State, that, where

²⁷ *Masters v. Masters*, 249 Ill. App. 259 (1928); *Roeper v. Danese*, 206 Iowa 964, 221 N. W. 506 (1928) (based on a statute); *Burrill v. Giles*, 119 Me. 111, 109 Atl. 390 (1920); *Parks v. Murphy*, 166 Ark. 564, 266 S. W. 673 (1924); *Sartain v. Davis*, 323 Ill. 269, 154 N. E. 101 (1926); *Threadgill v. Home Loan Co.*, 219 Ala. 411, 122 So. 401 (1929); *Ready v. McGillivray*, 109 Wash. 387, 186 Pac. 902 (1920); *Capen v. Capen*, 234 Mass. 355, 125 N. E. 692 (1920).

²⁸ "The rules of chancery practice do not require that exceptions should be taken to the various rulings of the court made in the progress of the cause, or to the final decree itself. The entire proceedings are matters of record, and appeals from the chancery court to this court are tried *de novo* without the taking of technical exceptions." *Parks v. Murphy*, 166 Ark. 564, 266 S. W. 673 (1924).

there is error in the declaration, pleadings or judgment committed against the protest or over the demurrer or other objection of a party, the same may be reviewed and corrected in this Court, although no motion has been made for a new trial in the court below, and no exception was reserved by bill of exceptions or otherwise.²⁹

Perhaps what caused the court, in the quoted portion of the opinion above, to express a doubt as to the validity of the distinction mentioned by it is why, if the reason why an exception is required is to refute waiver or acquiescence, an exception should not be required in all instances, whether the matter involved is part of the record (pleadings) or is something which must be brought into the record by a bill of exceptions.

Only one modern West-Virginia case has been noted which may be taken as casting doubt on views expressed in earlier cases, such as those quoted above, to the effect that an exception is not necessary to the ruling of a court on a demurrer. In *Johnson v. Hawkins*,³⁰ a demurrer to the declaration was interposed on the ground that the plaintiff administrator had failed to allege his appointment and qualifications. The demurrer was overruled and it was insisted that the error committed could not be urged in the Supreme Court of Appeals because no exception had been taken to the ruling on the demurrer. This contention was answered by the court as follows:

"Although no exception on behalf of defendants was taken to the action of the court in overruling their demurrer to the declaration, such adverse action was specifically assigned as one of the grounds for setting aside the verdict. This saved the point."

The method of disposing of the contention would seem to indicate that the court assumed that an exception to the ruling was necessary. Otherwise, presumably the court would have disposed of the matter in accord with the earlier cases by simply saying that no exception was necessary.

Observations in the cases, such as those quoted above, to the effect that an exception is not necessary to a ruling on a demurrer, are predicated on the common law and presumably are based on an assumption that it is not necessary to except to a ruling dealing

²⁹ *Spence v. Robinson*, 35 W. Va. 313, 316, 13 S. E. 1004 (1891).

³⁰ 110 W. Va. 199, 157 S. E. 412 (1931).

with something which is *per se* a part of the record. However, there were two statutes in the Code of 1868, each continuing until enactment of the Revised Code in 1931, which seemingly were intended to reinforce and supplement the principle that it is not necessary to except as to matters appearing on the record.

One of these statutes is a sentence in the section³¹ dealing with exceptions and bills of exceptions. The first part of the section provides generally for exceptions and bills of exceptions. Then follows the sentence in question, which reads as follows:

"Any party may avail himself of any error appearing on the record, by which he is prejudiced, without excepting thereto."

It would seem that this provision was intended to confine the necessity of excepting to those instances only where an exception is necessary as an ingredient of a bill of exceptions, for the purpose of bringing into the record things which are not part of the record *per se*; in other words, wholly to dispense with exceptions as based on any doctrine of waiver or acquiescence. The legislative intent to dispense with exceptions under the circumstances mentioned in this provision would seem to be too plain for argument; and similar statutes have been so construed in other states. However, in *Sweeney v. Baker*,³² decided ten years after enactment of the statute,³³ the court made the statement (apparently unnecessary for a decision of the case) that the words in the statute "without excepting thereto" merely meant "without filing a bill of exceptions." Under this interpretation, exceptions were not dispensed with, but only bills of exceptions. This interpretation of the statute was perpetuated in subsequent cases,³⁴ until it came to be accepted as too well established to be repudiated,³⁵ although in later cases it was subjected to criticism and followed with reluctance.³⁶ Finally, in

³¹ W. VA. CODE c. 131, §9 (Barnes, 1923); W. VA. CODE c. 56, art. 6, §35 (1931).

³² 13 W. Va. 158 (1878).

³³ The statute was ignored in cases prior to *Sweeney v. Baker*. See *Quesenberry v. People's Bldg., Loan & Savings Ass'n*, 44 W. Va. 512, 519, 30 S. E. 73, 75 (1898).

³⁴ See *Perry v. Horn*, 22 W. Va. 381 (1883); *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004 (1891); *Quesenberry v. People's Bldg., Loan & Savings Ass'n*, 44 W. Va. 512, 30 S. E. 73 (1898).

³⁵ *Quesenberry v. People's Bldg., Loan & Savings Ass'n*, 44 W. Va. 512, 519, 30 S. E. 73, 75 (1898).

³⁶ "I doubt, however, whether we are at liberty to curtail the remedial efficacy of the act by interpolating any other language than that employed in

1931, the judicial interpretation was carried into the Revised Code,³⁷ the provision quoted above being modified, in the language of the syllabus of *Perry v. Horn*,³⁸ so as to read as follows:

"Any party may avail himself of any error appearing on the record, by which he is prejudiced, without obtaining a formal bill of exceptions, provided he objects or excepts on the record to the action of the court complained of, and provided it is such a matter as can be considered without a formal bill of exceptions."

It will be noted that this amended provision not only abolishes any effect that the old provision may have been intended to have as dispensing with the necessity of exceptions as to matters appearing on the record, but it seems to require exceptions as to such matters. It dispenses with a bill of exceptions only in the event that the litigant "objects or excepts on the record."³⁹ On the other hand, if there is no objection or exception on the record, a bill of exceptions, which includes an exception, is necessary. In other words, under either alternative an exception would seem to be necessary. Unless the effect of this provision as now constituted may be considered as modified by another provision following it in the Revised Code and hereinafter discussed, it would now seem necessary, for purposes of review, to except to all rulings and all acts of the court, whether or not the supposed error appears on the record; for example, to a ruling on a demurrer to a pleading.

The other statute heretofore mentioned as appearing in the Code of 1868 is the one which provided a statutory substitute for a demurrer as a means of testing the sufficiency of a pleading. It continued in force until repealed by the Revised Code in 1931⁴⁰ and reads as follows:

"When a plea is offered in any action or suit, which is not sufficient in law to constitute a defence therein, the plaintiff may object to the filing thereof on that ground, and the same

the act itself, which is perfectly free from all ambiguity." Lucas, President, in *Spence v. Robinson*, 35 W. Va. 313, 315, 13 S. E. 1004 (1891). See *Quesenberry v. People's Bldg., Loan & Savings Ass'n*, 44 W. Va. 512, 519, 30 S. E. 73 (1898).

³⁷ W. VA. CODE c. 56, art. 6, §35 (1931).

³⁸ 22 W. Va. 381 (1883).

³⁹ If the word "objects" in this provision could be taken as referring to an objection which precedes the ruling, it might be interpreted as dispensing with an exception after the ruling; but obviously, as more fully discussed hereinafter, "objects" is used as synonymous with "excepts".

⁴⁰ W. VA. CODE c. 56, art. 4, §36 (1931).

shall be rejected. But if the court overrule the objection and allow the plea to be filed, the plaintiff may take issue thereon without losing the benefit of the objection, and may, on appeal from a judgment rendered in the case in favor of the defendant, avail himself of the error committed in allowing such plea to be filed, without excepting to the decision of the court thereon."⁴¹

It may be surmised that the provision in this section dispensing with exceptions when a plea is filed over objection was drafted with the intention of making the practice under it conform to what was understood to be the common law practice on a demurrer to a pleading. The filing of the plea made it a part of the record. Filing it over objection was equivalent to overruling a demurrer to it after it had been filed. Wherefore, if it was not necessary to except to the overruling of a demurrer to it, it should not be necessary to except to the filing of it over objection. It should be noted, for purposes of reviewing the cases hereinafter cited and discussed, that the statute dispenses with an exception only when a plea is filed over objection and is silent as to whether or not an exception is necessary when a plea is rejected.

It seems entirely possible that this section might have been construed, like its companion statute hereinbefore discussed, not as dispensing with exceptions but as merely dispensing with bills of exceptions, but such was not the result. In all cases, apparently, where a pleading has been filed over objection, the court has ruled in accord with the statute and held that no exception is necessary, although the statute is not always mentioned as a basis of the holding and sometimes the court seems to be resorting to common law principles.⁴² On the other hand, the court has uniformly held that, if a pleading is rejected in pursuance of an objection to its filing, an exception is necessary as a prerequisite to appellate relief.⁴³

⁴¹ W. VA. CODE c. 125, §56 (Barnes, 1923). This section would seem to apply to pleas only, and not to replications and subsequent pleadings. However, the practice prescribed by it has been applied, without comment, to replications.

⁴² *First National Bank v. Kimberlands*, 16 W. Va. 555, 573 (1880); *Quaker City Nat. Bank v. Showacre*, 26 W. Va. 48 (1885); *Spence v. Robinson*, 35 W. Va. 313, 13 S. E. 1004 (1891). In all the cases cited here and hereinafter, the statute is mentioned only in the first case cited above and in *Hart v. Baltimore & O. R. R.*, cited below.

⁴³ *Hart v. Baltimore & O. R. R.*, 6 W. Va. 336 (1873); *King v. Burdett*, 12 W. Va. 688 (1878); *Sweeney v. Baker*, 13 W. Va. 158 (1878); *Perry v. Horn*, 22 W. Va. 381 (1883); *Shank v. Ravenswood*, 43 W. Va. 242, 27 S. E. 223 (1897); *Quesenberry v. People's Bldg., Loan & Savings Ass'n*, 44 W. Va. 512, 30 S. E. 73 (1898).

Sometimes the reason given why an exception is necessary is that an exception and a bill of exceptions are necessary to bring the rejected plea into the record;⁴⁴ but more frequently the reason emphasized is that absence of an exception indicates waiver of the objection and acquiescence in the court's ruling.⁴⁵

It might be surmised that the cases cited in the last paragraph are no longer of any practical importance, since a section in the Revised Code⁴⁶ now prohibits objection to the filing of any pleading because of its insufficiency. It must not be forgotten, however, that it may still be not only proper, but necessary, to object to the filing of a pleading for reasons other than its sufficiency, as where it is tendered too late or lacks a necessary affidavit. In such cases, when a pleading is offered and its filing is objected to, the courts will still have to deal with the necessity of saving an exception, and now whether the pleading is filed or rejected, since there is no longer any statute dispensing with an exception when it is filed over objection.

Passing on from the pleadings in a case to the trial procedure, we come to a field of error where the matters involved are not part of the record. Here the necessity of exceptions can be adequately explained by the fact that they are required as bases for bills of exceptions for the purpose of bringing such matters into the record. However, cases may be found where the court entirely ignores such an explanation and justifies requirement of the exception on the theory of waiver or acquiescence. For example, in *Bluefield v. McClaugherty*,⁴⁷ certain evidence was admitted over objection. No exception was saved. The Supreme Court of Appeals, refusing to consider the objection on a writ of error, uses the following language:

"The objection was overruled but no exception was noted. We think the objection was waived. The defect was one of mere authentication, easily correctible and no doubt would

⁴⁴ *Hart v. Baltimore & O. R. R.*, 6 W. Va. 336 (1873); *King v. Burdett*, 12 W. Va. 688 (1878).

⁴⁵ The weight given to waiver or acquiescence would seem to be particularly demonstrated by the fact that it appears to be the view of the court that, although a rejected pleading is made part of the record by a court order, thus dispensing with a bill of exception, still an exception is a prerequisite to review. See *Sweeney v. Baker*, 13 W. Va. 158 (1878) and *Shank v. Ravenswood*, 43 W. Va. 242, 27 S. E. 223 (1897).

⁴⁶ W. VA. CODE c. 56, art. 4, §36 (1931).

⁴⁷ 64 W. Va. 536, 542, 63 S. E. 363 (1908).

have been supplied if the court had sustained the objection, or if the defendant had insisted upon it by noting an exception."

Proceeding further, from trial procedure to the verdict and judgment, both of which are parts of the record, we come to a case,⁴⁸ decided not long after the case last quoted, in which it was claimed that there was error because of inconsistency between the verdict and the judgment. The case was a criminal case and it was contended that the trial court had entered a judgment imposing a penalty in excess of the punishment prescribed by law for the crime of which the verdict had found the defendant guilty. No exception was taken to the overruling of a motion to set aside the verdict or to the judgment. The Supreme Court of Appeals held that no exception was necessary. It might have based its holding, as in the prior case, on the ground that the objection was waived by failure to except; but, instead, it justified the absence of an exception on the ground that an exception is necessary only when required for the purpose of bringing something into the record by a bill of exceptions. The following observations are made in the opinions:

"In reference to the first point, it is only necessary to say that the rule of practice requiring bills of exceptions to be taken to the action of the court, upon motions made in the progress of the trial, and saving such exceptions by bills of exception to be made part of the record by the court's order, is for the purpose of putting into the record, for the purpose of review by the appellate court, such matters as would not otherwise appear in the record. This rule does not apply to a case where the error complained of can be ascertained by the record. In the present case the error, if any, can be seen by a comparison of the final judgment of the court with the verdict. These are always matters of record, and when the judgment is the only thing complained of no motion need be made to set it aside, and no bill of exceptions is necessary."

In the first point of the syllabus, the court further says:

"If the error complained of be, that the final judgment is in excess of the verdict, it is matter of record and may be reviewed on writ of error, without any formal exception being taken to the action of the trial court. In such cases, it is not necessary that a motion to set aside the verdict should have been overruled, and an exception taken, in order to entitle the complaining party to a writ of error."

⁴⁸ *State v. Arbruzino*, 67 W. Va. 534, 68 S. E. 269 (1910).

As to whether it is necessary generally, for purposes of review, to except to the entry of a final judgment on a verdict in a common law action, or entry of a final decree in chancery, the West Virginia authorities are meager. The views of the court expressed in the criminal case heretofore quoted are based on broad general principles and would seem to apply equally to a civil action; and there are intimations and assumptions, by way of dictum, in other cases to the effect that it is not necessary to except to the entry of a final decree in equity.⁴⁹ It has been specifically and definitely decided that it is not necessary, though the usual practice,⁵⁰ to except to the entry of a judgment in a case tried by the court in lieu of a jury. In *Bailey Lumber Company v. Ward*,⁵¹ the court says:

"The trial of the action of *Bailey Lumber Company v. Dunn*, having been had before the judge of the court in lieu of a jury, it was not necessary for the purpose of perfecting a writ of error that the complaining party should except to the adverse rulings and findings of the judge. *Board v. Parsons*, 24 W. Va. 551; *State v. Miller* 26 W. Va. 106. In the *Miller Case*, this court said: 'It is sufficient if the facts appear upon the record by certificate of the court or otherwise. In such case this court will inspect the record and either affirm or reverse the judgment, as the law requires. It would seem to be a useless formality to except to the judgment of the court in such a case. An exception might as well be taken to a decree in chancery.'"

The West Virginia court, in accord with the holdings in other jurisdictions, has held that an objection or exception is not necessary when the matter complained of is of such a nature that it could not be remedied in pursuance of an objection and exception.⁵²

After all that has been said as to the necessity of exceptions, and as to the different theories upon which they may or may not be required, it remains to inquire whether a provision in the Revised

⁴⁹ For examples, see *Board of Education v. Parsons*, 24 W. Va. 551, 553 (1884) and *State v. Miller*, 26 W. Va. 106, 109 (1885).

⁵⁰ *Board of Education v. Parsons*, 24 W. Va. 551, 553 (1884).

⁵¹ 109 W. Va. 55, 152 S. E. 862 (1930). The rule is otherwise in many jurisdictions where the court is required to make specific findings as to the law and the facts. See 4 C. J. S. 725 *et seq.* (1937).

⁵² See *Neill v. Rogers Bros. Produce Co.*, 38 W. Va. 228, 18 S. E. 563 (1893) (where the trial judge made an improper commentary on the evidence in the presence of the jury, the effect of which could not be eradicated by instruction). See the numerous cases cited in 1 MICHIE, DIGEST OF VA. & W. VA. REPORTS 390 (1929), where the court lacked jurisdiction.

Code, not yet considered, has made all this discussion, for practical purposes, superfluous, by way of dispensing with exceptions in all instances, regardless of the nature or status of the subject matter involved. The inquiry calls for a more extended quotation of a section already partly quoted.

"In the trial of a case at law in which a writ of error or supersedeas lies to the court of appeals, a party may except to any action or opinion of the court and tender a bill of exceptions . . . Any party may avail himself of any error appearing on the record, by which he is prejudiced, without obtaining a formal bill of exceptions, provided he objects or excepts on the record to the action of the court complained of, and provided it is such a matter as can be considered without a formal bill of exceptions. *In all cases an objection noted on the record shall have the same effect as if followed by a formal exception to the ruling of the court thereon, and no exception shall be necessary in order to permit the party objecting to avail himself thereof.*"⁵³

Only the first two sentences quoted above were in the section as it was submitted to the Legislature by the Code Revisers. The last sentence, in italics, was added by the legislative committee appointed for the purpose of examining the revision draft and recommending to the legislature approval thereof or changes therein.

It would seem very clear that this section as submitted by the Revisers contemplated (if it did not require) exceptions to the rulings and action of a trial court as prerequisite to a writ of error. It would seem rather obvious that the word "objects," in the second sentence, is used as synonymous with the word "excepts," a usage common in the local cases,⁵⁴ and that it is not used in its ordinary and proper sense as indicating a protest preceding a ruling. One would hardly object to "the action of the court" until the action has taken place.

The sentence in italics, added by the legislative committee, standing alone, while requiring an objection, would clearly seem to dispense in all instances with an exception after the court has ruled, as has been done in other jurisdictions. Clearly, the word "objection" is used in this sentence in its proper sense, as denoting

⁵³ W. VA. CODE c. 56, art. 4, §35 (1931). Italics supplied.

⁵⁴ See cases cited *supra* note 3.

something which precedes the ruling, and the word "exception" as indicating action following the ruling, since the "exception" is described as following the "objection."

It may be surmised that the confusion and contradiction resulting from this double revision came about in the following manner. The legislative committee received from the Revisers a section providing for exceptions. It decided that an objection preceding a court ruling was enough and that an exception following the ruling was unnecessary. It drafted a provision to that effect. Then this provision was thrown into the section drafted by the Revisers, without sufficient deliberation as to how it might harmonize with the context to which it was joined. The result is that we have a section which in one part provides for, and even seems to require, exceptions, and in another part says that they are not necessary.

The task of construing the section as it now stands in the Code presents a problem of no little difficulty. All its contradictory provisions were enacted by the legislature at the same time. Hence no provision is amendatory of another and, according to ordinary rules of construction, all the provisions must be construed together in *pari materia* and a reconciliation attempted. Is it possible that the court, as a last resort and departing from orthodox rules of construction, might look back of the legislative enactment and construe the provision added by the legislative committee as amendatory of the section submitted by the Revisers? The difficulty in this solution is that the legislature, and neither the legislative committee nor the revisers, had the last say, and the legislature approved the language of both the Revisers and the legislative committee.

In no case since enactment of the section in 1931 has the Supreme Court of Appeals undertaken to deal with the difficulties which seem to be involved in its construction. In two cases the court assumes that exceptions are still necessary, making no reference to the statute. In *Harman v. Spurlock*,⁵⁵ decided in 1939, the court held that "objection or exception" (seemingly using "objection" as synonymous with "exception") to the action of the trial court in awarding a peremptory writ of prohibition was necessary,

⁵⁵ 121 W. Va. 633, 5 S. E.2d. 797 (1939).

no reference being made to the statute. In *Baker v. Gaskins*,⁵⁶ decided in 1942, it was held that an exception to the trial court's action in directing a verdict for the defendant was necessary for purposes of review. The following statement is made in the syllabus:

A writ of error to an order of the trial court, to which no objection or exception has been taken, will be discharged as having been improvidently awarded."

Here, again, no reference is made to the statute. But in a later case, *Cline v. Evans*,⁵⁷ decided in 1944, the court says:

"There was no exception to the action of the court in allowing the hospital records to be filed, but under Code, 56-6-35, no formal exception was necessary."

It will be noted that the section of the Code referred to is the one under discussion. The only commentary on the statute and the point decided is the single sentence quoted. Presumably the court had in mind the interpolation made by the legislative committee.

Can this last case, with its brief commentary and its general reference to the statute, be safely accepted as having definitively established the law to the effect that exceptions are no longer necessary? Seemingly, if the statute dispenses with exceptions in one instance, it does so in all instances. Or is there a possibility that, when the court is called upon to go into all the complications of the statute, as it apparently was not in any of the cases so far decided, it may modify the effect of the general statement made in the last case decided? Under the present state of the law, statutory and judicial, should a litigant be accused of an excess of precaution if he excepts to all rulings of a trial court, whatever the nature or status of the subject matter of the exception, when he seriously relies upon a point of error for purposes of review?

Whatever may be the effect of the statute dealing with exceptions, there is one instance in the local practice where both objections and exceptions are necessary. A rule of practice promulgated by the Supreme Court of Appeals specifically and definitely prescribes that, for purposes of review, objection, with grounds assigned, must be made to the giving of an instruction to a jury at

⁵⁶ 124 W. Va. 69, 19 S. E.2d 92 (1942).

⁵⁷ 127 W. Va. 113, 121, 31 S. E.2d 681 (1944).

the time when the instruction is offered, and that an exception must be saved to the giving or refusal of the instruction at the time of the court's ruling.⁵⁸ This court rule was promulgated after the statute was enacted and therefore is amendatory of the statute.

As to the advisability of abolishing generally the requirement of exceptions, there may be some controversy. That the Legislature thought that this should be done when it enacted the present section in the Code dealing with exceptions, whatever construction may finally be put upon the section, may be fairly surmised. On the other hand, the Supreme Court of Appeals, when it promulgated the rule applying to instructions, after enactment of the statute, must have been convinced that exceptions, at least on the giving or refusal of instructions are desirable. In spite of the many forceful judicial defenses of the expediency of requiring exceptions, such as that of Judge Hand hereinbefore quoted, there seems to be a modern tendency to dispense with them generally.⁵⁹ That not all trial judges are convinced of their importance is indicated by the practice which prevails in some of the judicial circuits of this state. It is the practice of some judges, at the beginning of a trial, to allow in advance blanket exceptions to all rulings of the court that may be made in its progress. Such a practice, in practical effect, amounts to dispensing with exceptions, and would seem to serve no purpose intended to be served by proper exceptions. It is contrary to the rule that exceptions must be specific⁶⁰ and, although its validity does not seem to have been ruled upon in this state, it has been held illegal in other states.⁶¹

⁵⁸ "Objections, if any, to each instruction shall be made when the same is offered; specific grounds of objection only will be considered. Exceptions to the refusal to grant or to granting the same or to modified instructions shall be made at the time, or the same shall be deemed to be waived." Supreme Court Rule VI (e), 116 W. Va. lxii (1936).

⁵⁹ See FED. R. CIV. P. 46. Formal exceptions have been abolished in many states. See note to the rule above cited in DOBIE & LADD, CASES ON FEDERAL JURISDICTION & PROCEDURE (1940), listing Illinois, New Mexico, North Dakota, Ohio, South Dakota, Utah, Virginia, and Wisconsin, as states in which formal exceptions have been abolished by statute or rule of court.

⁶⁰ 4 C. J. S. 664 (1937); 3 AM. JUR. 50 (1936). Many cases are cited supporting this proposition.

⁶¹ See *Kennedy v. Cunningham*, 59 Ky. 538 (1859) (where it is said "the court had frequently announced before the bar, that it would consider all questions decided by the court on the trial as reserved, without formal exceptions taken at the time." The appellate court said that such a practice would circumvent entirely the object of requiring an exception—to warn the trial court and opposing counsel of non-acquiescence in the ruling of the court at a time when a warning would serve some purpose. See also *Green v. Terminal R. Ass'n of St. Louis*, 211 Mo. 18, 109 S. W. 715 (1908).

ERRATA

The following corrections should be made in an article, "Objections and Exceptions," printed in the December, 1949, number of this publication:

In the eighth line of the second paragraph, page 16, the word "review" should be substituted for the word "view."

In the fourteenth line of the same paragraph, the word "objections" should be in the singular.

In the seventh line of the middle paragraph, page 21, the word "qualifications" should be in the singular.

At the end of the paragraph first beginning on page 26, the word "opinions" should be in the singular .

These errors were not in the manuscript as submitted for publication.